"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

REVIEWING THE VIEWS

Bangladesh needs to revisit old investment treaties

Ashfaquzzaman Chowdhury

DURING the current pandemic, apart from all Covid-19 related disheartening news from in and outside of the country, Bangladesh has received some good news too. The rift between the United States and China resulted in problems for foreign investors in China. Many foreign-owned companies are reframing their business strategy to overcome the ongoing trouble. As a part of new business strategy, many companies have decided to relocate part or full of their production plant to some other countries with the favourable business environment. Fortunately, Bangladesh is in the list of those few countries where foreign investors from some capital-exporting countries are showing interest.

Recently, the Japanese entrepreneurs have expressed their interest to invest in Bangladesh. Bangladesh holds a friendly relationship with Japan since long. Japan International Cooperation Agency (JICA) has financed many significant development projects in Bangladesh. Worldwide Japan is renowned for its technological advancement and it owns global motor and techno giants like Toyota, Mitsubishi, Honda and Sony. If Bangladesh can provide the necessary support, investment from Japan will definitely open a new horizon in the job sectors of Bangladesh and developing knowledge and skills in sophisticated technologies.

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The guarantee of protection that foreign investor looks into before it invests is a significant issue for countries that expect inward foreign direct investment. Generally, foreign investors take into consideration the level of protection they will get in the host State. In this case, they do not merely rely on the words of the Government; rather, they require legal protection under international law. In the last more than three decades, the world has witnessed a boom in the adoption of instruments protecting foreign investment under international law. These instruments are popularly known as Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs) and Free Trade Agreements (FTAs) with investment chapter. These instruments are signed between or among countries and provide the definition of investment, investors, and the level of protection investors from contracting parties will receive in the territory of host State and if anything adverse happens then what remedy the investor can resort. When such agreements are signed between a capital-exporting and a capital importing country, the trend so far has been to provide expensive unconditional protection in the treaty to foreign investors.

Treaties that provided expensive protection to the foreign investors have drawn much debate in the last decade or more and continued to be subject of criticism from a group of scholars mostly from developing countries. Foreign investors dragged many States to international forum based on the protection that the host State promised to it but did not provide or violated. One of the popular destinations of investors in resolving their dispute with the State is the International Centre for Settlement of Investment Disputes (ICSID). The ICSID arbitration has produced many awards in favour of investors upholding their claims against State. Bangladesh has also experienced such move by the foreign investor in *Saipem* v *Bangladesh* (ICSID Case No. ARB/05/07).

Due to the asymmetric nature of the investment treaties, foreign investors hold an advantageous position in investment arbitration. However, in the last several years, many countries have brought significant change in their foreign investment policy and treaties. They updated treaty provisions in rebalancing the system. Bangladesh has signed around 34 BITs so far. However, the provisions of most of these BITs are old fashioned and tilt too much towards the foreign investors. The current situation signals that in the coming years, Bangladesh will be able to attract and accommodate new foreign investments from different capital-exporting countries who want to avoid their damage due to rift between global powers. Therefore, Bangladesh needs to revisit its existing BITs to ensure in the one hand, just and adequate protection to the foreign investors is provided, and on the other hand, State's power to regulate also saved.

Based on the experience of the outcome of investment arbitration, new developments have taken place in the investment treaty drafting. These developments broadly include the insertion of specific provision relating to corruption, corporate social responsibility related obligations to the investors, human rights and labour protection-related provision, sustainable development and environmental protection related provision, limiting the scope of most favoured nation (MFN) provision, the provision on the scope of third party funding and inclusion counterclaim provision. In this process, some States have taken the extensive protectionist approach (for example, Brazil) and most others though brought change but cannot be labelled as too protectionist.

At present, almost all the BITs of Bangladesh belong to the categories of first and second generations BITs that hold less regulatory scope for the host State and provide only rights to the investors, impose no obligation on them. As there is a possibility of attracting new foreign investment in the coming days, therefore, it is the best time to revisit the BITs of Bangladesh to update and adjust their provisions considering the new developments and clarifying the meaning of some provisions considering their evolution in the arbitral jurisprudence. This update could be done either by holding fast track renegotiation of old BITs or by adopting additional protocol to the existing BITs and also by adopting joint interpretative note to the existing BITs.

THE WRITER IS A MPHIL CANDIDATE (INTERNATIONAL INVESTMENT LAW), SOUTH ASIAN UNIVERSITY, NEW DELHI.

LAW OPINION

Stalemate with regard to the MP's vacation of seat upon foreign court's conviction

Md. Ikra

OF late a sitting-member of the current parliament named Mr. Shahid Islam alias Papul has been arrested in Kuwait on charges of human trafficking and money laundering. An application for bail was immediately placed at local court, but his legal attempt to get released from the detention fell through. According to media reports, he was not there on his official capacity rather he was staying there for business purposes. The indictment, if convicted, may result in an imprisonment of minimum seven years and maximum fifteen years under section 178 of the Kuwaiti Penal Code, 1960.

Article 67 of the Constitution to be read with Article 66(2) provides certain situations where a seat in the parliament may get vacated. These grounds include conviction for a criminal offence involving moral turpitude of which the sentence of imprisonment must be for two years at least and a period of five years must elapse since his release. The competency for an election and the capacity to hold the seat after taking the oath – both must satisfy the stated criterion set by the Constitution. To date, we have not seen an instance where a sitting MP had to vacate his office upon conviction pronounced by a court. Not to be confused, in *Janata Tower Corruption Case*, the Appellate Division upheld the Sessions Court's conviction against HM Ershad on corruption charges and the final sentence of imprisonment exceeding three years prospectively disqualified him to contest the 8th parliamentary election in 2001.

Linking it to MP Papul's context, the court dealing with the case is situated in a foreign state and regulated under different laws than those of Bangladesh. Since our Constitution did not specify which court conviction will results in the vacation of seat, the prime question now stands whether our Constitution intended to attract the jurisdiction of both domestic and foreign courts in this regard. The case would have been a straightforward one if it had been a case under domestic jurisdiction. Unfortunately, the words inscribed in the Constitution are not enough to draw a definite conclusion to this question. Interpretations coming from legal scholars are polar opposite to each other. It is either foreign court's conviction for a criminal offence calls for vacation of seats or it does not. The word 'court' should be construed as a court of competent jurisdiction. Since he was physically present during the commission of alleged crime in a foreign country, he must accept the foreign laws as obligatory upon him and violation of which legitimately calls for foreign court's jurisdiction over him. There is simply no other way to deny the jurisdiction of Kuwait over MP Papul.

Once the question of jurisdiction settles down, the question of enforceability stands up. In order to establish a nexus between these two, the first inquiry should be into whether a foreign court's criminal conviction is enforceable in Bangladesh or not. If the answer is in the negative, how does it carry the same weight as a competent domestic court does? Wanting to remove an MP based on an unenforceable foreign verdict would be profoundly unfair. However, the entire scenario needs to be more cautiously interpreted in light of the Constitution and relevant practices.

Though we do not have any provision where the domestic law permits to execute foreign court's criminal judgment, there are instances where the execution of foreign judgments of civil nature is permitted. Under the Code of Civil Procedure, 1908 foreign judgments are deemed to be judgment pronounced by a domestic court upon fulfilling court's satisfaction thus enforceable in Bangladesh. Foreign arbitral awards are also recognised and enforceable under Section 45 of the Arbitration Act, 2001. Section 4 of the Digital Security Act, 2018 confers an extra-territorial jurisdiction where the court can take cognizance of crimes committed outside the territory of Bangladesh. So, the enforcement of foreign judgments in our country is not alien to our legal system.

In this very case, MP Papul has been allegedly partaken in human trafficking and money laundering which are both punishable offences under our domestic law. If the request for repatriation fails, it is likely that he is going to face the prosecution. If the charges are proved beyond reasonable doubt, he will be imprisoned for a period to be determined by the court. As our current parliament is in the middle of its second year, longer sentence will put a bar to his returning home and who can tell for sure that this parliament will still be there when he gets back. However, this is certainly not an incident of one-off kind, and the repetition of the same incident is unexpected but not unlikely. A proper guideline in this regard is necessary and if the same incident takes place in future, it will establish a perilous precedent.

THE WRITER IS A FINAL YEAR LAW STUDENT, BANGLADESH UNIVERSITY OF PROFESSIONALS (BUP).

LAW WATCH

Preventing pharmaceutical malpractice

Farzana Akther

INFODEMIC and alluring false drugs' promise to cure pandemic COVID-19 are compounding the ongoing public health crisis gradually. Unapproved and unregulated online business of selling the fake drugs are adding fuel to the existing fire. Fake face mask, counterfeit test kits, misbranded medicine are also on the rise. So, these phenomena should be addressed with strong medical ethics and state regulation.

In Bangladesh, the State mandate of preventing drug malpractice can be extracted from article 18 of the Constitution which bolsters adopting effective measures to prevent drug consumption injurious to public health. This constitutional provision is proliferated in policy no. 4.7 of the National Drug Policy 2016 which says that "the selling of fake, adulterated, expired, unregistered, counterfeit, misbranded drug are punishable offenses due to hindrance of good governance in the drug sector, consequently, drug manufacturers, organisation, wholesale and retail seller are all accountable". Any person or organisation associated with production, marketing, sale, distribution, and/or storage of such drugs is to be subjected to stringent legal action and the respective license is also to be revoked by the Directorate General of Drug Administration. Moreover, the right to health as an extension of the fundamental right to life has acquired a new dimension due to the spread of deadly diseases across the world as well as in our country.

The World Health Organization (WHO) estimates that one in 10 medical products circulating in low- and middle-income countries are either substandard or fake, which is both dangerous and a waste of money. Various academic studies have put the prevalence at between 11% and 48%. Of 1,500 reports of such products, most came from Africa (42%), with south-east Asia also a major hotspot for fake medications.

As per section 8 of the Drugs Act 1940, the standard quality of the drug denotes the drugs which comply with the standards set out in the schedule of the Act. Section 9 of the said Act launched the idea of "misbranded drug". It implies if the drug is an intimation of, substitution for, or resembles in a manner likely to deceive, another drug or bears upon it or its label or container the name of another drug unless it is plainly and conspicuously marked as to reveal its true character and its lack of identity with such other drug. Prohibition is imposed on the manufacturing and selling of substandard and misbranded drugs in section 18 of the Act. The corresponding section 28 refers that whoever in respect of any drug sold by him whether as principal or agent gives to the purchaser a false warranty that the drug does not in any way contravene the provisions of section 18 shall unless he proves that when he gave the warranty he had good reason to believe that the same to be true be punishable with imprisonment which may extend to one year with fine or with both.

The existing legal sanction is not comprehensive enough to address the issue of exposure of fake and substandard drugs during the pandemic. The increased punishment scale with precise determinants should be introduced for controlling this quasi-pandemic phenomenon. The High Court Division (HCD)'s observation to the effect that "production, sale, and storage of fake and adulterated medicine should be dealt with maximum punishment resonates with the sentiments of most people in the country". The remark was made at the time of hearing submissions following a writ petition filed with HCD on June 17, 2019, seeking confiscation of time-barred, fake and adulterated medicine from drug stores all over the country.

According to section 7 of the Infectious Diseases (Prevention, Control, and Eradication) Act 2018, the functions of the advisory committee constituted under the Act include observing and reviewing the antibiotics with other medicines which are used in the treatment of communicable diseases. Section 9 of the Act emphasised to comply with the health instructions and regulations of WHO for protecting public health during the pandemic.

Making false medicine is an opportunistic crime, more common in places where regulatory oversight is weak or inconsistent. In this unforeseeable situation, stakeholders from all corners should consider the development of effective communication and training programmes for consumers and health workers on understanding the quality and safety of the medicine.

THE WRITER IS A LECTURER AT THE DEPARTMENT OF LAW AND HUMAN RIGHTS, UNIVERSITY OF ASIA PACIFIC.

FOR YOUR INFORMATION

Human rights violations against student protesters

CIVIL society groups Front Line Defenders, CIVICUS and South Asians for Human Rights (SAHR) have jointly published a report highlighting the use of excessive force, arbitrary arrests and allegations of torture and ill-treatment by the Bangladesh security forces during student protests. The report also sheds light on attacks by non-state actors perpetrated with impunity against the students.

The report titled 'Crushing Student Protests' has come out on 10 June 2020. It discusses the government's response to two major student protests (quota reform and road safety movements) in 2018. The report states that both movements were faced with excessive use of force by law enforcement agencies. It also states that unidentified armed individuals – associated with the ruling party – attacked protesters with wooden logs, sticks, iron rods, and sharp weapons. Multiple cases were filed by the police against protesters, journalists were assaulted and detained; many student activists, their friends and family members continued to face surveillance, intimidation and harassment. The report states that these patterns portray how repression is continued for a longer period of time and effectively silences future dissent.

One such arrested journalist was Shahidul Alam, a well-known photojournalist and activist. Mr. Alam was arrested by plainclothes policemen on 5 August 2018, a few hours after giving an interview to Al Jazeera English on the student protests. The next day, he was charged under the Information and Communication Technology (ICT) Act for making "false" and "provocative" statements.

The report observes that the crackdown on protests is indicative of a broader pattern of aggression and attacks by the Government against critics to silence dissent. The ICT Act (previously) and (now) the Digital Security Act, have been used to charge and convict human rights activists, journalists and government critics for speaking up. Incidents of forced disappearance are also found.

Based on the study, the report opines that human rights defenders in Bangladesh have been subjected to 'unprecedented attacks' over the last ten years. Some of the human rights defenders have even left the country for safety after being targeted by extremist groups or even the State. They have not received proper support from the police and authorities. Others have been publicly smeared or have faced false accusations.

These violations are inconsistent with Bangladesh's Constitution and its international human rights obligations under the ICCPR and Convention against Torture, and other international laws and standards.

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